

UNISPAN FORMWORK SDN BHD

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v.

KIM CHOY TRACTOR WORKS SDN BHD

HIGH COURT MALAYA, SHAH ALAM

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ALIZATUL KHAIR OSMAN JC

[CIVIL APPEAL NO: MT4-28-242-2002]

7 MAY 2004

COMPANY LAW: *Winding-up - Petition - Affidavit in opposition, application for adjournment to file - Whether court has discretion to extend time - Companies (Winding-Up) Rules 1972, rr. 30(1), 193 - Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank*

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The respondent applied for an adjournment to file an affidavit opposing the petition against it on the day of the hearing of the said petition. The petitioner opposed the application on two grounds. Firstly, that the respondent had knowledge of the petition some eight months ago. Secondly, the court did not have the discretion to extend time by virtue of r. 30(1) of the Companies (Winding-Up) Rules 1972 ('the Rules') based on the Court of Appeal decision in *Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank*.

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Held (dismissing the application):

- [1] By virtue of the Court of Appeal decision in *Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank*, r. 30(1) of the Rules is mandatory and does not admit an exercise of discretion by the court. Further, the affidavit in opposition was filed on the day of the hearing of the petition itself. This was in clear violation of r. 30(1) that required the filing thereof at least seven days before the time appointed for the hearing of the petition. Even if the court had an overriding discretion to extend or abridge time by virtue of r. 193, there were no merits in the application for adjournment. The respondent had more than ample time to file the said affidavit if it seriously intended to oppose the petition. The reasons advanced by the respondent for its tardiness were not sufficiently cogent to justify the court's exercise of its discretion, if any. The fact that the respondent waited until the last minute to file the said affidavit could only lead one to conclude that it was intended or calculated to delay proceedings and was therefore not *bona fide*. Although r. 193 empowers the court to grant an extension or abridgement of time, the decision in *Crocuses & Daffodils* indirectly ruled that r. 193 did not admit the exercise of such discretion in the case of affidavits filed under r. 30. (pp 154 c, g, 155 b-c, e & 156 e)

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a Case(s) referred to:

Arab Malaysian Merchant Bank v. Orient Apparel Bhd [1999] 2 CLJ 647 HC (**refd**)
Arise Enterprise Sdn Bhd v. Feiyeen Sanherk Hardware Sdn Bhd [2002] 5 CLJ 13

HC (**refd**)

Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank [1997]
3 CLJ 485 CA (**fol**)

b *Lix Industries Sdn Bhd v. Greenworld Industry Sdn Bhd* [1998] 7 MLJ 403 (**refd**)

Ng Thoong Chen v. Kedah Marble Sdn Bhd [2002] MLJU 199 (**refd**)

Re Pek Chuan Development Ltd [1988] 1 MLJ 140 (**refd**)

Sam Hin Timber Co v. Perusahaan Sri Duyong Sdn Bhd [1983] 2 CLJ 269; [1983]
CLJ (Rep) 838 HC (**refd**)

c *Soda KL Plaza Sdn Bhd v. Noble Circle (M) Sdn Bhd* [2002] 2 MLJ 367 (**refd**)

PT Anakapagan Dwitama v. Far East Food Industries Sdn Bhd [1998] 4 CLJ Supp
437 HC (**refd**)

Legislation referred to:

Companies Act 1965, s. 221(1)

d Companies (Winding-Up) Rules 1972, rr. 30(1), 193, 194(1)

For the respondent - T Gunalan; M/s Naht, Guna & Partners

For the petitioner - ST Chew; M/s Rajah Lau & Assoc

Reported by Usha Thiagarajah

e JUDGMENT**Alizatul Khair Osman JC:**

This is an appeal against my decision to dismiss the respondent's application for adjournment to file affidavit in opposition to the petition, and to subsequently grant order in terms of the petition. The brief background of the case is as follows:

f Unispan Formwork Sdn Bhd. (petitioner) filed a petition for winding up against Kim Choy Tractor Works Sdn. Bhd. (respondent) on 12 November 2002 following from the failure of the latter to comply with the s. 218(e) notice of demand which was issued on 27 August 2002 (Lampiran C. encl. (1)).

g According to the petitioner, the respondent is alleged to have owed the petitioner a sum of RM91,742.43 as at 31 July 2002 which sum represents the balance of rental for goods and equipment rented by the petitioner to the respondent at the latter's request.

h The petition together with the affidavit verifying the petitioner was served on the respondent on 8 March 2003 (see affidavit of service dated 25 March 2003 encl. (4)). Subsequently the same set of documents were served on M/s Naht,

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Guna and Partners, solicitor for the respondent by A.R. Registered post on 10 March 2003 (see affidavit of service at encl. (5)). The petition was duly gazetted on 13 February 2003 and advertised in the STAR and Berita Harian newspapers on 14 February 2003 and 15 February 2003.

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The registrar's certificate under r. 32 of the Companies Winding-up Rules 1972 was extracted on 2 April 2003. On 5 March 2003, the respondent entered appearance *vide* encl. (10). In the list of persons intending to appear at the hearing of the petition which was filed by the petitioner on 10 April 2003 (encl. 11), the respondent's solicitors M/S Naht, Guna & Partners was listed as person intending to appear.

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On the day of hearing of the petition on 4 September 2003, counsel for respondent, En. T. Gunalan applied for an adjournment on the ground that he has just filed the affidavit in reply (opposing the petition) together with an application for extension of time to file the affidavit that same morning. According to counsel he had just received instructions and obtained the necessary documents from his client (respondent) on Tuesday (ie, 2 September 2003) and hence could only file the affidavit and the application that day. He therefore requested for a short and final adjournment.

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Miss ST Chew counsel for the petitioner strenuously opposed the application for adjournment on two grounds. Firstly the respondent had been aware of the petition from as far back as 23 December 2002 (ie, some eight months ago) when their solicitors wrote to the petitioner's solicitors requesting for the cause papers.

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Secondly, counsel relied on the Court of Appeal decision of *Crocuses & Daffodils (M) Sdn. Bhd v. Development and Commercial Bank* [1997] 3 CLJ 485 (Crocuses & Daffodils) to argue that r. 30(1) of the Companies (Winding-Up) Rules 1972 (the Winding-up Rules) is a mandatory requirement and the court therefore has no discretion to grant an extension of time to file the affidavit.

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In reply, counsel for respondent did not deny that they had known of the petition since 23 December 2002 and was infact served on 10 March 2003. They however contend that the delay was attributed to their inability to obtain the relevant documents from the respondent until just a few days before the hearing date. Hence, their failure to file the affidavit in reply within the prescribed time. Counsel further claimed that the application (for adjournment) was not intended to frustrate the petition but to enable the respondent to defend the petition. According to counsel the affidavit filed by the respondent shows relevant issues.

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a It must be stated here that as the affidavit in opposition was only filed that same morning, the said affidavit was not yet in the court file and was therefore not before the court.

b As stated by the Court of Appeal in *Crocuses & Daffodils (supra)*, s. 221(1) of the Companies Act 1965 (the Act) empowers the court with a discretion to grant an adjournment at the hearing of a creditor's petition. However the court here is constrained from exercising its discretion to grant an adjournment for the following reasons:

c Firstly this court is bound by the Court of Appeal's decision in *Crocuses and Daffodils* which held that rule 30(1) of the Winding-Up Rules is mandatory and does not admit of an exercise of discretion by the court. Rule 30(1) provides thus: "Affidavits in opposition to a petition that a company may be wound-up shall be filed and a copy thereof served on the Petitioner or his solicitor at least seven days before the time appointed for the hearing of the Petition. (emphasis added).

d In that case the hearing of the winding-up petition was fixed on 21 September 1992. Just three days before the hearing, the appellant company filed a notice of intention to oppose the petition on the ground that they dispute the debt due to the bank. The petition was adjourned several times and was finally disposed of on 24 November 1992. On each adjournment an affidavit in opposition was served on the respondents bank but the affidavit were not filed in accordance with the requirements of r. 30(1) of the Winding-up Rules in that it was not served at least seven days before the date of hearing of the petition.

e The Court of Appeal in upholding the learned judge's decision to disallow admission of the four affidavits for failure to comply with r. 30(1) of the Winding-up Rules, opined that by its words and expression r. 30(1) of the said rules is mandatory in nature and hence must be strictly complied with.

f In the instant case the affidavit in opposition was filed on the day of the hearing of the petition itself. This is in clear violation of r. 30(1) which requires the affidavit to be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition. Counsel for the petitioner cited the case of *Soda KL Plaza Sdn. Bhd v. Noble Circle (M) Sdn. Bhd* [2002] 2 MLJ 367 in support of her contention that the word "shall" in r. 30(1) is mandatory in nature which does not admit of an exercise of discretion by the court. To my mind it is not necessary for this court to satisfy itself on the effect of the word "shall" in r. 30(1) as the Court of Appeal has already affirmatively ruled on this issue. Suffice it to say that

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this court is bound by such a ruling and consequently the court has no alternative but to deny the respondent's application for an adjournment to enable it to file the affidavit concerned.

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Secondly, even if it can be argued (which the court doubts in view of the Court of Appeal's firm ruling on this issue) that despite the strict wording of r. 30(1), the court maintains an overriding discretion to extend or abridge the time appointed by the Rules by virtue of r. 193 of the Winding-up Rules, this court finds that there are no merits in the application for adjournment. In the court's view, respondent had more than ample time to file the affidavit in reply if they seriously intend to oppose the petition. The reasons advanced by counsel for its tardiness are not sufficiently cogent to justify the court's exercise of its discretion (if any). As exhorted by Faiza Tamby Chik J in *Soda K.L Plaza Sdn. Bhd. (supra)* "it is trite law that rules of the court must be obeyed and in order to justify any exercise of discretion in favour of a party there must be material to satisfy the court that such discretion ought to be exercised." Although this is the first date of hearing of the petition, it is well established that as a general rule, winding-up proceedings should be heard expeditiously (see *Re Pek Chuan Development Ltd* [1988] 1 MLJ 140, the judgment of Chan Sek Keong, JC (as he then was)). The same view was expressed by the Court of Appeal in *Crocuses & Daffodils* wherein Siti Norma Yaacob JCA (as she then was) pronounced "Proceedings in the form of execution of judgment should never be allowed to drag on and more so, when such proceedings concern the compulsory winding-up of a company". Hence respondent should not have waited until the last minute to file an affidavit in opposition particularly since they had eight months to do so. Such an act could only lead one to conclude (although this was denied by respondent's solicitors) that it was intended or calculated to delay proceedings and is therefore not *bona fide*.

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Finally I would like to refer to the case of *Arab Malaysian Merchant Bank v. Orient Apparel Bhd* [1999] 2 CLJ 647 which was cited by the respondent's counsel in support of his submission before the court. The learned judge in the said case had at p. 653 expressed the following view with respect to the Court of Appeal's decision in *Crocuses & Daffodils*:

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Having read *Crocuses* carefully it would appear to me that all the Court of Appeal had ruled in that case was that rule 30 was mandatory in nature. It did not however consider the power of the court to condone the irregularity under s. 194(1) of the Companies (Winding-Up) Rules 1972 which provides that no proceedings under the Act or the rules shall be invalidated by any formal defect or any irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularities and that the injustice cannot be remedial by any order of the court. It follows therefore the court of Appeal's decision in *Crocuses* must be construed to apply only to the factual peculiarity of that case.

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- a* This view was endorsed in the subsequent case of *Ng Thoong Chen v. Kedah Marble Sdn. Bhd* [2002] MLJU 199 and *Arise Enterprise Sdn. Bhd v. Feiyeen Sanherk Hardware Sdn. Bhd* [2002] 5 CLJ 13. With respect to the views expressed in the abovesaid cases, r. 194 of the Winding-Up Rules is to my mind a saving clause which seeks to preserve the validity of winding-up proceedings in the event of any formal defect or irregularity unless the court is of the opinion that substantial injustice has been caused by such defect or irregularity. As to what amounts to a formal defect or irregularity under r. 194(1) can perhaps be gleaned from r. 194(2) which provides that no defect or irregularity in the appointment or election of a receiver, liquidator or member of a committee of inspection shall vitiate any done by him in good faith.

- c* Rule 194(1) thus envisages a defect or irregularity which is technical in nature such as the premature swearing of an affidavit (see *Sam Hin Timber Co. v. Perusahaan Sri Duyong Sdn. Bhd.* [1983] 2 CLJ 269; [1983] CLJ (Rep) 838), imprecise details in the petition (see *Lix Industries Sdn Bhd v. Greenworld Industry Sdn. Bhd* [1998] 7 MLJ 403) or the failure to state the amount claimed in the petition (see *PT Anakapagan Dwitama v. Far East Food Industries Sdn. Bhd* [1998] 4 CLJ Supp 437). In all these cases the court held that the defect or irregularity is purely formal and therefore curable under r. 194(1). Rule 194(1) does not in my view apply to the present case. Here, the issue is whether the court has power to extend or abridge the time for filing the affidavit in opposition as required by r. 30(1). Although r. 193 of the Winding-up Rules (which is the relevant provision in this case) empowers the court to grant such extension or abridgement, the Court of Appeal in ruling as it did that r. 30 is mandatory in nature has indirectly (in my view) ruled that r. 193 does not admit the exercise of such discretion in the case of affidavits filed under r. 30.

- e* For the above reasons therefore, the court is compelled to dismiss the respondent's application for adjournment for the purpose of filing the said affidavit and to order instead the winding-up of the respondent company as prayed for in the petition, the appointment of the official receiver as liquidator and costs to be paid out of the assets of the respondent company.

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